IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 486

RUBEIN V. JOHNSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RUBEIN V. JOHNSON,
For and in his own cause.

Apartment #3,
3300 St. Charles Avenue,
New Orleans, Louisiana.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner and defendant, Rubein V. Johnson, a citizen of the United States and of the State of Louisiana, presents herewith application for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in Case No.

10,984 affirming a conviction before a jury in the District Court of the United States for the Eastern District of Louisiana.

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended and set forth on page 30, etc., of the Revised Rules of the Supreme Court of the United States, making it competent for this Court to review by certiorari, any case, civil or criminal, in a Circuit Court of Appeals when the application is made within thirty days after entry of judgment (denial of rehearing) as required by the rules of this Honorable Court.

STATUTES INVOLVED.

The Federal Statutes involved are:

Section 338, Title 18, U. S. C. A.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United

States, in any post box, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

Section 77Q, 1, (a) Title 15, U. S. C. A.

(a) "It shall be unlawful for any person in the sales of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly—

(1) "To employ any device, scheme or artifice to defraud, or . . ."

STATEMENT OF THE CASE.

Your defendant, Rubein V. Johnson, was one of eight co-defendants joined in a conspiracy type indictment brought in the United States District Court for the Eastern District of Louisiana, in which he was charged with violating Section 388, Title 18, U. S. C. A. (Mail Fraud Statute) and Sec. 77 Q (a) (1), Title 15, U. S. C. A. (Securities and Exchange Act).

All of the defendants were found guilty on two counts each of the aforesaid Statutes.

Your defendant was sentenced to serve five years on Count No. 4 and two years on Count No. 5. The sentence on Count No. 5 to run consecutively with the five years imposed on Count No. 4; these counts being violations of the Mail Fraud Statute. He was further sentenced to a term of five years imposed on Count No. 1 and two years on Count No. 2 to run consecutively to Count No. 1, these being violations of the Securities and Exchange Act; the sentences under Counts 1 and 2 to run concurrently with the sentences imposed on Counts 4 and 5, thus making a total of seven years.

Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. A judgment affirming the conviction was rendered on July 10, 1946. Application was made for a rehearing which application was denied on August 12, 1946. Your defendant thereupon filed an application for a stay of mandate for a period of thirty days to enable your petitioner to apply for writs of certiorari to the Supreme Court of the United States for review of the said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. This application was granted on August 16, 1946.

Your petitioner was found guilty by a jury on each of the aforesaid counts on the elements of a conspiracy, not having in his own instance violated the prohibited overt act of any of the substantive offenses charged but

having been convicted as a co-conspirator with other defendants against whom an overt act under the mentioned statutes was charged.

SPECIFICATIONS OF ERRORS URGED.

The United States Circuit Court of Appeals erred in failing to hold:

(1) That the District Court for the Eastern District of Louisiana erred in refusing to consider a bill of exceptions to the validity of Counts 1 and 2 of the indictment, and in failing to maintain the various motions and exceptions taken in connection with Counts 1 and 2 of the indictment, as well as the motion for a directed verdict on these counts, for the reason that these Counts 1 and 2 were alleged violations of Sec. 77 A (a) (1) Title 15, U. S. C. A. (Securities and Exchange Act) whereas the evidence offered by the government showed conclusively that the securities were "cash deeds" covering the sale in fee simple of real estate and were not securities within the text or meaning of the act and that the admission of the evidence thereon over proper and timely objection acted to prejudice the minds of the jury on matters not coming properly under the alleged violation of that particular act.

(2) That the trial Court committed substantial and prejudicial error in refusing to charge the jury that "the defendant did not have to take the stand and that the failure of the defendant to take the stand was not to be considered or discussed by the jury as an element of his guilt or innocence" and

further that the statement of the Court that it was elementary that he did not have to so instruct the jury was by inference an instruction to the jury that it was the duty of the jury to consider the failure of the defendant to take the stand as an element of guilt and in thus inflaming the minds of the jury to your petitioner's prejudice.

(3) This admitted error on the part of the trial judge after the jury had been allowed to retire and deliberate for several hours was not cured by the subsequent correction of the charge by the trial Court after the jury, by its request for additional instruction, had indicated to the trial judge that it had already found some of the defendants guilty.

(4) That the trial Court committed substantial and prejudicial error in its charge to the jury on the question of reasonable doubt and upon its charge of assumption of innocence.

(5) That the trial Court should have granted this defendant's MOTION FOR A DIRECTED VERDICT which motion was made at the opening of the trial for the reason that the defendant had been denied a speedy trial granted by the Sixth Amendment to the Constitution of the United States and in support of this contention your petitioner has requested that the record be supplemented to show those factual and legal elements which the present record has omitted and which motions he asks this Court to consider and which are reflected by the certified extracts attached to this petition and which of themselves present the diligent effort of the defendant to present to the trial Court his application for a speedy trial.

(6) The evidence does not show or establish a general conspiracy and scheme, but, on the contrary is conclusive of separate and distinct schemes.

The United States Circuit Court of Appeals for the Fifth Circuit did not consider the point raised by this petitioner's "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE".

TRANSCRIPT BY REFERENCE AND ADOPTION WITH EXHIBITS ANNEXED.

Petitioner's appeal to the Circuit Court of Appeals was in *forma pauperis* and the record was paid for by petitioner's co-defendants. Your petitioner is informed that writs of certiorari to this Honorable Court have also been filed by a number of co-defendants and he therefore respectfully requests that the record which is being furnished to this Court by the co-defendants will be made available to him, and he therefore adopts the record as furnished by the co-defendants as the record in his cause with the request that certain certified copies of records which were before the Circuit Court of Appeals for the Fifth Circuit in typewritten form be attached to this petition so that they may be physically before this Honorable Court and may be considered in connection with this application. That the motions referred to and which were certified by the Clerk of the Crcuit Court of Appeals for the Fifth Circuit are the following to-wit:

1. MOTION FOR SUPPLEMENTAL RECORD.

2. EXTRAORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS.

3. SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE.

With these motions before the Court it will be in a position to properly consider this appeal at it was presented to the Circuit Court of Appeals.

BRIEF.

Your petitioner files herewith and makes part of his application for writs a brief in support of the specifications of errors herein urged.

WHEREFORE, petitioner, Rubein V. Johnson, respectfully prays that a writ of certiorari may issue to the Honorable the United States Court of Appeals for the Fifth Circuit to the end that his cause may be reviewed and determined by this Court and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may thereafter in due course be reversed and set aside and that judgment may be rendered herein setting aside the conviction and the sentence pronounced in connection therewith and discharging your petitioner.

Petitioner prays for all further and necessary orders and for such relief as the nature of his cause in this case may justify.

RUBEIN V. JOHNSON,
Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND ARGUMENT ON THE SPECIFICATIONS OF ERRORS URGED.

1.

It is respectfully submitted that the trial Court erred in refusing to consider the bill of exceptions to the validity of Counts 1 and 2 of the indictment. These counts which were under Sec. 77Q (a) (1), Title 15, U. S. C. A. (Securities & Exchange Act) covered transactions in which the "securities" were actually cash deeds conveying a title in fee simple of real estate located in Louisiana. These conveyances of title used are in effect "deeds poll" and as such are complete in their legal substance under the law of the State of Louisiana sufficient to convey title and they contain incorporated within their four corners the entire contract between the parties. They show all liens or encumbrances on the said property, including mineral leases and/or royalty sales previously made. They conveyed to the purchaser a good and merchantable title and they contained no qualifying phrases or no further obligation upon the part of the vendors. The deeds themselves completed the transaction as between the parties and there can be no contention that there was any obligation, either express or implied, that was assumed by the vendors. They represented to the purchaser that he was buying certain acreage of Louisiana land and the deed or title as given actually conveyed to the purchaser the exact property which he had contracted to buy. There were no unrelated contracts in which the vendors or any other party

obligated themselves to do anything. The indictment does not allege nor does the government contend that there were any agreement, either written or verbal, that the property would be re-purchased. The transaction was exactly the same as the thousands of other real estate transfers that take place every day in these United States and the interest that was conveyed in the property was a full and complete title to the land, itself, and was not a sale of a fractional interest in the property conveyed. Under these circumstances it is respectfully contended that the sale was not one of "securities" so as to bring the transaction under the Securities and Exchange Act.

It is respectfully contended that the trial Court was in error in allowing the government to introduce any evidence in connection with these deeds and the trial Court was in error in failing to dismiss Counts 1 and 2, because by instructing the jury that they had a right to consider evidence in connection with the deeds as a violation of the Securities Act, the Court impregnated the minds of the jury with a declaration that to have dealt in the "securities" was a violation of the Securities Act. It is respectfully submitted to this Court that when the trial judge instructed the jury to consider the guilt or innocence of your appellant on Counts 1 and 2 the effect must of necessity been cumulative in its prejudicial effect on the jury. The Circuit Court of Appeals has passed over the question of the legal validity of Counts 1 and 2 in stating that since the sentences imposed on Counts 1 and 2 are to run concurrently with the two Mail Fraud Counts, that if there has been a

valid conviction on the two Mail Fraud Counts "the judgment must be affirmed, while if they are not it must be reversed". The entire indictment as it went to the jury contained two counts for alleged violations of the Securities Act and two counts for the alleged violation of the Mail Fraud Statute. In other words ONE HALF OF THE INDICTMENT AS IT WENT TO THE JURY WITH THESE ILLEGAL COUNTS, AND THE ILLEGAL EVIDENCE IN RELATION THERETO, WAS DECIDED BY THAT JURY WITH ONE HALF OF THE COUNTS OF THE INDICTMENT INVALID. The material and substantial damage done to the cause of your petitioner by said invalid and illegal counts and the inadmissible evidence thereto could only serve to the prejudice of your petitioner. Certainly it must be said that the inadmissible evidence offered by the government over the objection of your petitioner in relation to these two counts must have influenced the verdict of the jury on the whole of the indictment and especially is this true if each of the counts were interwoven with each of the other counts and with the charge of a general conspiracy.

If the elements of conspiracy run continuously and unbroken to join this petitioner to the other alleged coconspirators, then, by showing that other alleged coconspirators joined in the sale of cash deeds and if there is no other evidence except the joint pattern and design of all of the alleged co-conspirators to sell this real estate and if, as this petitioner complains, there is no overt act on his part of using the mails to defraud then it becomes very important that this Court should decide

whether or not the "cash deeds" are in fact "securities" within the meaning of the Securities & Exchange Act. Unless there has been a violation of the Securities & Exchange Act, there is no element of a conspiracy either charged or proven against this defendant which would connect him with Counts 4 and 5 (Mail Fraud) and the trial Court should therefore have granted his Motion For A Directed Verdict at the end of the trial. The only possible theory upon which this petitioner could have been convicted under Counts 4 and 5 (Mail Fraud) would have been because he was engaged in an unlawful conspiracy to violate the Securities Act. If the "cash deeds" were not securities within the meaning of the Securities & Exchange Act, then the entire conviction should fall as to this defendant.

2.

The appellant's cause in relation to this question should be considered in a different light than those defendants who were represented by learned counsel. It is contended that it was the duty of that trial Court to protest the essential rights of an accused—and in the absence of counsel in his behalf—there should not have been placed upon an unversed layman the burden of a decision on a technical question of law upon which the various attorneys were split, and especialy where subsequent events proved that the Court itself was in error in its denial of Mr. Coleman's (counsel for Silverman) motion for the special charge in this matter. The trial Court, by its expression that the refusal of request of Mr. Coleman was "elementary" had the effect of be-

littling Mr. Coleman before the jury and thus involuntarily and unwittingly caused your appellant to fail to take advantage of a bill of exceptions on this point. Had your appellant requested a bill of exceptions on this point, in view of the trial Court's criticism of the request, it would have brought your appellant into the same sphere of unwarranted criticism as was Mr. Coleman's client, with the same effect in the jury's mind. Naturally this appellant had no desire to incur the animosity or enmity of the Court by making a request for a bill of exceptions in the face of that open criticism. IT SHOULD BE BORNE IN MIND THAT THE REFUSAL OF THE COURT TO GRANT THE REQUEST OF MR. COLEMAN WAS AN IMPLIED INSTRUCTION THAT IT WAS NOT ONLY THE JURY'S PREROGATIVE TO CONSIDER AND DISCUSS THE APPELLANT'S FAILURE TO TAKE THE STAND BUT THAT FURTHER IT WAS THE JURY'S DUTY TO CONSIDER THE FAILURE OF THE DEFENDANT TO TAKE THE STAND AS AN EVIDENCE OF HIS GUILT. It is therefore respectfully submitted that the trial Court not only failed to protect the essential rights of your appellant but that further, through its criticism, it invaded the constitutional right granted to your appellant to refrain from taking the witness stand.

3.

The United States Circuit Court of Appeals for the Fifth Circuit has held that although the trial Judge committed reversible error in failing to instruct the jury "that it was not to consider as an element of innocence

or guilt the failure of any defendant to take the stand and that this failure of a defendant to take the stand was not to be a subject of discussion among the jury", it has concluded that this error was cured by the subsequent correction of it by its charge. It is respectfully submitted to this Court that if the defendant is entitled to charge at all, then by its very nature he was entitled to it before the jury began any of its deliberations. In the instant case the jury had been deliberating approximately six hours and then returned to the Court for the purpose of requesting further instruction. The instruction that they requested showed that they had already come to a conclusion regarding the guilt of some of the defendants. This being so, it is submitted that the effect of the correction was entirely lost. In *Bruno v. United States*, 308 U. S. 37, this Court has decided that it was reversible erorr for the Court to fail to give such an instruction. If this decision can be ignored by first allowing the jury to make up its mind as to the guilt of a defendant and in then allowing the trial Court to give the instruction, the will of Congress will have been circumvented.

4.

The trial Court, in instructing the jury on the question of reasonable doubt, stated that "a reasonable doubt is one for which a reason may be given" and in connection with the charge of the presumption of innocence it said:

> "But as forceful as that rule is in the protection of one who stands charged with crime, it must not

be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who is in fact guilty so that he or she may escape just punishment. The rule is but a human provision of law, intended to prevent so far as human agencies can the conviction of an innocent defendant, but nothing more."

The latter instruction is the identical word for word language condemned by the same Circuit Court of Appeals for the Fifth Circuit in the case of *Gomila v. United States*, 146 Fed. (2d) 372. The writer adopts the language of the Circuit Court of Appeals in that case as an argument against this instruction. With reference to the charge on reasonable doubt, it is submitted that mere reading of the instruction is sufficient to show its incorrectness.

The Circuit Court of Appeals with reference to these instructions stated that the trial Court had corrected the charges. A close and careful re-reading of the charges given by the Court has failed to disclose where the trial Court did correct the charge. It is respectfully submitted that it is not sufficient that the Court should have given other instructions which correctly stated the law. Even though the Court may have in a dozen instances given the correct charge, still if he has allowed himself to give one erroneous charge, then that erroneous charge can only be cured by a specific instruction of the Court to disregard what it has previously said and then to properly enunciate the legal principle. Clearly in this case the trial Court did not instruct the jury to disregard what

it had said regarding a reasonable doubt and the presumption of innocence.

5.

The trial Court should have granted this petitioner's Motion For A Directed Verdict (at the opening of the case) because he had been denied the right for a speedy trial guaranteed by the Sixth Amendment to the Constitution. In support of this contention he has asked that the record be supplemented in order to reflect what actually transpired previous to the trial. The record, as it now stands, shows only a letter forwarded to the United States Attorney (R. 201 and 202) which constitutes a first demand for a speedy trial. The government admits the receipt of the letter (R. 190) where it is stated by the United States Attorney, the following to-wit: "On December 2, 1942 he wrote my office * * *". Despite this request for an early trial there elapsed a period of FOURTEEN MONTHS AND TWENTY-SIX DAYS before the trial was begun. Therefore the failure of the government to bring this matter to trial within a reasonable time constituted a denial by the government of a speedy trial as guaranteed by the Sixth Amendment to the Constitution and shows an invasion of that constitutional guarantee. This petitioner's second request for a speedy trial was filed by him in a so-called "Writ of Mandamus" which in substance was nothing more or less than a "Motion For A Speedy Trial". Although such Motion for a Speedy Trial was forwarded by this petitioner while he was incarcerated in the United States Penitentiary at Atlanta, Georgia and was received by

the Clerk of the United States District Court for the Eastern District of Louisiana, it was never filed as an official part of the record of the case, nor is this motion reflected in the record. It is marked Exhibit J-G of the Exhibits filed with this petition and is dated March 16, 1943, ELEVEN MONTHS AND TWELVE DAYS before the trial was begun. Again your petitioner's constitutional guarantee of a speedy trial was abridged. IT WAS A SECOND DEMAND FOR A SPEEDY TRIAL AND LIKE THE FIRST WAS ALSO IGNORED BY THE GOVERNMENT.

Petitioner respectfully does request that this Honorable Court examine in full the two exhibits annexed as a supplement to the record and listed in this petition as (1) MOTION FOR SUPPLEMENTAL RECORD, and, (2) EXTRA-ORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS (with all exhibits attached thereto to such aforesaid exhibits) and upon examination of the aforesaid two motions it will be shown that this petitioner did everything in his power to get the record supplemented to reflect his cause in its true light because such record as it now stands does not show his Motion For Speedy Trial hereinabove referred to, nor does it show his Motion For Directed Verdict (at the opening of the trial referred to by the record on page 187) where is established the fact that this Motion For A Directed Verdict was submitted to the Court. Such Motion For A Directed Verdict in relation thereto is reflected by Paragraph 3 of the exhibit annexed and brought up to this Court in supplement to the record by

being there attached as Exhibit J-5 on the Motion For Supplemental Record. The full text of the aforesaid exhibits; MOTION FOR SUPPLEMENTAL RECORD and EXTRA-ORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS (together with 11 exhibits attached thereto) will upon examination establish the fact that the trial Court was not only determined to deny justice to this petitioner but was also determined to prevent the fullness of factual and legal elements there involved from appearing in the record for proper review before the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals for the Fifth Circuit apparently did not consider these two exhibits which were before them at the time of their hearing for their decision is and was contrary to all principles of law as laid down by the several courts in relation to this valuable guarantee of the Sixth Amendment, inasmuch as the factual and legal elements here involved establish the fact that this petitioner twice requested and demanded a speedy trial and was twice ignored by the Government. As a result of requesting such speedy trial in two demands he did not acquiesce in the matter and therefore his case stands within the following principles of law as cited by the cases of:

Pietch v. United States, C. C. A. Okla., 1940, 110 F. (2d) 817, 129 A. L. R. 563, certiorari denied, 60 S. Ct. 1100, 310 U. S. 648, 84 L. Ed. 1414 where at page 819, 110 F. (2d) is stated:

> "A person charged with a crime cannot assert with success that his right to a speedy trial guaran-

teed by the Sixth Amendment to the Constitution has been invaded unless he asked for a trial. In the absence of an affirmative request or demand for trial made to the Court it must be presumed that appellant acquiesced in the delay and therefore cannot complain."

Ex Parte Pickerill, D. C. Tex., 1942, 44 F. Supp., 741, at page 742 states:

"The Sixth Amendment to the Constitution provides that, 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. The usual method for the enjoyment of this protection afforded by this provision is to ask for trial'."

Continuing is stated:

". . . it has been held that one already serving a term may, nevertheless, demand a trial upon another indictment which pends against him, because of this valuable guarantee. United States v. Cox, 5 Cir., 47 Fed. 2d, 988; McCarty v. United States District Court, 8 Cir., 19 F. (2d) 462; United States ex rel., Whitaker v. Hemming, 9 Cir., 15 F. (2d) 760; Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950.

"The idea of the provision against an unreasonable delay in trial is not solely a release from imprisonment, in the event of acquittal, but also a release from the harrassment of criminal prosecution, and the anxiety attending the same . . ."

Continuing is stated:

". . . the amendment is all embracing, a prisoner, a convict, one on bond, or, any and every

person who is charged with an offense has a legal right to this speedy settlement of the charge that is asserted against him."

The principle of law as stated by the case of *Beavers v. Haubert*, 198 U. S. 77 states at page 86 the following:

> "Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. . . . It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of diferent indictments it must relate to the time of trial, not to the place of trial."

United States v. Cox, (5 C. C. A.) 47 F. (2d) 988 at page 989 states the following principle of law:

> "The right guaranteed to a defendant to have a speedy trial is not lost to him or in any substantial way abridged because of his being confined in the penitentiary. Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879; Frankel v. Woodrough, (C. C. A. 7) F. (2d) 796; McCarty v. U. S., (C. C. A.) 19 F. (2d) 462.
>
> "Whatever the form the relief should take, whether through the issuance by the Court of indictment of a Writ of Habeas Corpus Ad Prosequendum under Section 753, R. S. 28 U. S. C. A. Sec. 453, it is plain as that no dry or technical form of procedure should stand in the way of its granting, which can be easily afforded him through some available form of relief."

In the light of the foregoing authorities and with the exhibits which are attached to this petition there is es-

tablished factual evidence to show that this petitioner complied with every legal requisite in this connection. He had twice asked for a speedy trial and he was twice ignored by the government and it cannot be said that he acquiesced in the matter for when the case finally did come to trial he filed a written Motion For A Directed Verdict of acquittal (See paragraph 3 of Exhibit J-5). Not only did the trial Court fail to direct the verdict as requested but the Circuit Court of Appeals did not even pass upon the issue presented by the reiterated requests for a speedy trial and for the Motion For A Directed Verdict. Unless this Court passes upon the issue presented, this defendant submits to the Court that he has been deprived of his liberty only because of the fact that the Court have seen fit to ignore and brush aside your petitioner's guarantee under the Constitution. He has suffered because of official inaptitude and unless this Court in its supervisory power examines into this matter by reviewing the entire situation as shown by the attached exhibits then your petitioner has been deprived of his liberty without the due processes of law which are guaranteed to him as a constitutional right.

6.

The defendant in this matter was charged in a general conspiracy type indictment in which it is alleged that he, together with other alleged co-conspirators entered into a general conspiracy or scheme to violate the Securities and Exchange Act and that while so violating

the Securities and Exchange Act and in consort with the co-conspirators that one of the co-conspirators used the United States Mails for the purpose of carrying out the general conspiracy. The proof adduced by the government, however, showed a series of unrelated and separate actions wherein the defendant herein, acting alone or with one or more of the alleged co-conspirators did enter into separate and distinct transactions. Only a thorough and conscientious reading of the record will show that there was no general scheme or pattern and that each of the defendants made sales, sometimes alone and sometimes in collaboration with others.

It is respectfully submitted that this case comes entirely within the decision of this Court in the rule laid down in the very recent case, *Kotteakos v. United States*, 90 L. Ed. 1178, and is not controlled by *Burger v. United States*, 295 U. S. 78, as held by the Circuit Court of Appeals.

7.

This petitioner filed in the United States Circuit Court of Appeals for the Fifth Circuit, before the time of hearing, a motion entitled "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE". This motion is now before this Honorable Court and adduced on a certificate and certification from the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit as an exhibit and it is one of the attached exhibits to this petition. Your appellant feels that the motion is full and complete in itself and that it will ob-

viate the necessity of arguing the point before this Court. In it is raised the question of the Constitutionality of the Securities & Exchange Act in so far as it allows a quasi-judicial inquiry by the Commission and contains language that results in a compulsion upon the part of one dealing in securities to incriminate himself or to incriminate those engaged with him by forcing them to testify as to the nature of their business and then allows the use of the information secured under compulsion to be used as the basis for the bringing of an indictment. In so far as the Act seeks by compulsion to secure the information, then to that degree the act is unconstitutional. In such a method an inquiry was had from Frank I. Kiefer, who was one of the co-defendants charged, but who was not brought to trial.

Your petitioner therefore requests this Honorable Court to examine all of the legal elements involved and which have been raised by the filing of this "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE" and to consider the brief and argument contained therein, which, for purpose of brevity is adopted in this brief by reference. The Motion For New Trial On Newly Discovered Evidence was not passed upon by the Circuit Court of Appeals for the Fifth Circuit and your petitioner contends that he has a right to be heard on this question inasmuch as it contains infringements of certain constitutional rights as outlined therein.

CONCLUSION.

It is respectfully submitted that the errors committed by the United States Circuit Court of Appeals for the Fifth Circuit, as well as their failure to pass upon the material motions for a speedy trial and for a new trial on the grounds of newly discovered evidence are substantial errors of law and that this Court, in its supervisory power, should review all of the questions previously presented to the Circuit Court of Appeals and to that end it should issue a writ of certiorari as prayed for herein and that after a hearing that it should reverse the Circuit Court of Appeals and discharge your petitioner.

Respectfully submitted,

RUBEIN V. JOHNSON.